parties comes, in effect, to nothing more than this—an offer on the part of the pursuer to sell the house to the defender, binding on the pursuer for a certain time, within which the defender had the option to accept or decline the offer. But the exercise of the option, which was just the acceptance of the offer, to be effectual and binding on either party required to be in writing, or proved by the oath of the party who was said to have accepted. I do not therefore differ from the views which the Sheriff took as to the mode of proof by which alone the pursuer could establish the existence of the contract he was seeking to enforce.

The pursuer, however, does not now ask us to hold that there was a valid contract of sale between him and the defender, nor does he ask damages as for a breach of that contract. He now confines his claim to the first item mentioned in Cond. 6, being the cost of certain works performed by him at the request of the defender, and for which she undertook to pay (Cond. 3). But whether the pursuer's claim is one based on the defender's undertaking, or is (as put by Lord Deas in *Allan* v. *Gilchrist*) "a claim for reimbursement of substantial loss occasioned to the one party by the representations and inducements recklessly and unwarrantably held out to him by the other party," it may be proved *prout de jure.*

Lord Moncreiff — The Sheriff's judgment was in my opinion quite right on the case presented to him. But the pursuer has departed from his claim on contract, and we have to decide whether proof *prout de jure* is competent on the case as amended. As your Lordships are all agreed that a proof before answer should be allowed to the pursuer of his averments as amended, I do not propose to object to that course being followed. The defender admits (Answer 3) that she was dissatisfied with the house as she saw it in course of erection; that she made objections, and that the pursuer made alterations "which he led the defender to believe would involve very little additional cost." Thus it is not disputed that the pursuer made additions or alterations in consequence of objections made by the defender—at whose expense is the question? It may be that these admissions make the case special and let in proof *prout de jure* as was done in the cases of *Walker* v. *Milne* and *Bell* v. *Bell*, to which we were referred, although the present case is weaker inasmuch as the defender entirely denies that the work was done at her risk and was not *lucrata* by it to any extent.

But I desire to reserve my opinion as to the mode of proof in a case in which the defender gives no such admissions. It may be that the same principles would apply; but the authorities relied on do not seem to me to be conclusive. In *Walker* v. *Milne* the intending purchaser actually entered upon and broke up the intending seller's ground. Again in *Bell* v. *Bell* the intending seller built a house upon the other party's ground in the full sight and knowledge of the latter, who was *lucratus* by the value of the house. Thus in neither case was there any nice disputed question of contract or inducement to go to proof. The facts spoke for themselves.

There is no authority for the proposition that in every case in which a pursuer who claims damages for breach of a contract relating to heritage is unable to instruct the contract by writ or oath, he is entitled to prove by parole the very same averments for the purpose of obtaining, it may be, the same items of claim under the name of reimbursement or recompense for outlays made or work done on the faith of the alleged contract.

Counsel for the defender moved for expenses from the date of closing the record, in respect that the case had been decided wholly upon the amendment.

The Court pronounced this interlocutor:—

"The Lords allow the pursuer to amend his record in terms of his minute No. 14 of process, and the amendments having been made, of new close the record: Further having heard parties on the appeal, Recal the interlocutor appealed against: Allow the parties a proof before answer: Remit the cause to the Sheriff to proceed therein as accords, and with power to him to dispose of the expenses of this appeal as expenses in the cause."

Counsel for the Pursuer—Sol. Gen. Dickson, Q.C.— M'Clure. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender—Ure, Q.C.—J. Wilson. Agents—J. & J. Ross, W.S.

Friday, January 27.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

DICKSON *v.* BELL

Proof—Proof prout de jure—Agreement to Grant Abatement of Rent—Lease—Mandate.

Held that a tenant could competently prove an agreement to reduce the rent stipulated in a formal lease, for the period still current of the lease, by the writ of the landlord's agent, and (*dub.* Lord Young) that he could competently prove by parole that the agent's writ was authorised or homologated by the landlord.

Terms of letters passing between the landlord's agent and the tenant which *held* (*rev.* the Lord Ordinary and *diss.* Lord Trayner) not to amount to an unconditional agreement to modify the rent fixed by the lease.

Archibald William Dickson, proprietor of Hassendeanburn, Roxburghshire, brought an action against Robert Bell, tenant of the farm of Horsleyhill on that estate, for

declarator (1) that the defender was tenant of the farm under a lease for 15 years dated in 1891 at a rent of £400; (2) that the said lease was still valid and subsisting and binding upon the pursuer and the defender; and (3) that the defender was bound to pay the rent of £400 specified in the lease, or alternatively that the defender had held and possessed as a yearly tenant the said lands since Whitsunday 1896 at an annual rent of £400, and in any event to ordain the defender to pay the pursuer £641, 10s. 11d.

The defender pleaded, *inter alia*—"The pursuer having himself agreed to the defender continuing as tenant at the rent of £290, and said agreement having been acted on, this action cannot be maintained."

A proof was led before the Lord Ordinary (KINCAIRNEY). The circumstances proved are fully set forth in the opinion of the Lord Ordinary and the notes thereto.

On 14th June the Lord Ordinary pronounced the following interlocutor:—"Finds (1) that it has been proved by the writ of Messrs Scott-Moncrieff & Trail, the pursuer's agents, written with the pursuer's knowledge and authority, that the pursuer agreed to a reduction of the rent under the defender's lease to £290 per annum; (2) that on that footing the sum due to the pursuer was £17, 19s. 11d., and that it is admitted at the bar that subsequent to the date thereof a payment was made which more than exhausts said balance: Therefore assoilzies the defender from the conclusions of the summons, and decerns."

Note.—"This is an action by the proprietor of the estate of Hassendeanburn, in the county of Roxburgh, against the tenant of the farm of Horsleyhill on that estate, for declarator that the defender is tenant of the farm under a lease for fifteen years, dated in 1891, at a rent of £400; and it concludes for payment of £641, 10s. 1d., which is made up of two and a-half years' rent since Martinmas 1895, with interest, deducting £200 paid to account on 27th January 1897. £390 has since been paid to account under interlocutor of the Court. There is an alternative conclusion for declarator that the defender has possessed the farm as a yearly tenant at a rent of £400; but nothing was said in the debate about this conclusion.

"The defence is that the rent was reduced from £400 to £290, and the question is, whether this reduction of the rent has been proved by competent evidence. The defender does not maintain that this agreement to reduce the rent can be proved by parole. He admits that it cannot be so proved, and he does not say that there is any actual writing by the pursuer on which he can found. His case is that he can prove an agreement to reduce the rent by the writ of the pursuer's agents, and that he can prove by parole that his agents' writ was authorised by the pursuer. I think that it is competent for the defender to prove his case in that way, and that if he makes out these two points he succeeds. Whether he has succeeded is to my mind a very narrow question indeed, and I have not reached the conclusion that my judgment should be for the defender without considerable hesitation.

"The circumstances are very peculiar and unusual. The pursuer's predecessor in the lands of Hassendeanburn and other lands was Colonel Archibald Dickson, and in his time the defender gave notice that he meant to renounce his lease at Whitsunday 1896, in virtue of a clause in the lease which provided for a break at that term. The tenant's right to avail himself of this provision was, however, coupled with the proviso that he should pay or find security for all rents due or to become due.

"At Whitsunday 1895 he was largely in arrear and had found no security. After the defender had given his notice, negotiations took place with a view to a reduction of the rent, pending which Colonel Archibald Dickson died on 9th April 1895, that is, before the date when the tenant's notice as to the break could have received effect.

"Colonel Archibald Dickson left a settlement disposing of his estate so far as unentailed. But the estate of Hassendeanburn was entailed, and it appeared on inquiry that the present pursuer, if alive, was the next heir of entail; and if he were dead, that his daughter Catherine Isobel Dickson was the next heir; and she and her mother instructed Messrs Scott-Moncrieff & Trail to advise and act for her in the matter, and this was the manner in which the connection of these gentlemen with this property originated. The pursuer had, it appeared, gone abroad a considerable time before, and had not communicated with his wife and daughter or been heard of; and in these circumstances a petition was presented under the Presumption of Life Limitation Act, in which a judgment was obtained on 7th December 1895, finding that the pursuer must be presumed to be dead.

"Not long afterwards, however, communications reached Scott-Moncrieff & Trail tending to show that the pursuer was alive, and it seems that Mr D. Scott-Moncrieff, having had occasion to be in Montreal in the autumn of 1896, met the pursuer there by appointment. The pursuer afterwards returned to this country, where his identity with the heir of entail of Hassendeanburn was established, and his title was made up by Scott-Moncrieff & Trail as his agents, and he took possession of the estate. He came to this country in or about November 1896. Now, during this period between the death of Colonel Archibald Dickson in April 1895, and the pursuer's return to Scotland in November 1896, communications had been passing in regard to the reduction of the defender's rent, between the defender and his agents on the one hand, and Scott-Moncrieff & Trail as acting for the heir of entail, whoever he might be, and for Miss Dickson after the judgment in the petition under the Presumption of Life Limitation Act had been pronounced. The defender meanwhile continued in posses-

sion of the farm, and did not avail himself of the break in the lease, supposing he had been in a position to do so, which it rather appears he never was, owing to the heavy arrears of rent which he always owed. Matters had gone so far that at the time when Miss Dickson was supposed to be heiress of entail a draft minute as between her and the defender was prepared providing for a reduction to £290. But that draft minute also provided that a relative of the defender, Mr John Turnbull, a neighbouring farmer, should be cautioner for the rent. On this point there had been a misunderstanding, because Mr Turnbull declined to undertake that responsibility, and the draft minute was never extended. Had Mr Turnbull then agreed to become cautioner for the rent, I do not doubt that a formal minute of agreement reducing the rent to £290 would have been completed by Miss Dickson on the one part, and the defender on the other; and if that had been so, the question would have arisen, whether she, never having been infeft, was in a position to effect an alteration of the lease, or whether the pursuer would be bound by her acts. But these questions do not arise, because that was never done, and the condition that the defender should find security was not then waived, and I do not think it can be affirmed that the reduction was agreed to by Miss Dickson or Scott-Moncrieff & Trail as her agents. I find that in subsequent letters this caution was insisted on by Scott-Moncrieff & Trail, and when the pursuer came to Scotland and took up the estate, there was, in my opinion, no agreement to reduce the rent below the rent specified in the lease, by which he could have been bound. When he succeeded, it appears to me, that the original lease was still subsisting and unaffected, and he might, had he chosen, have refused to consent to any reduction.

"A letter dated 24th November 1896 by Scott-Moncrieff & Trail to Purdom & Sons, the defender's agents, is of some importance.* In that letter Scott-Moncrieff & Trail ask payment from the defender 'of at least a year's rental £290 without prejudice.' The letter then goes on to deal with the question of security, and submits a modified proposal. Now, it seems to me that this letter clearly shows that there was an intention to reduce the rent to £290, but I consider that it does not show that an agreement to that effect had been completed, but rather shows that such an agreement had not been completed, although it may be that it was on the eve of completion. Now, at the date of this letter the pursuer was in Scotland and in Edinburgh, and the letter was written by Scott-Moncrieff & Trail as his agents. The pursuer appears then to have been an almost daily visitor at the office of Scott-Moncrieff & Trail.

"So far as I can gather, the pursuer remained in Edinburgh until the middle of January, when he went to Hassendeanburn and took up his residence in the mansion-house there. Messrs Scott-Moncrieff & Trail continued to be his agents until 16th March 1897, when the agency was withdrawn and transferred to Messrs Haddon & Turnbull, writers, Hawick. It seems certain that no agreement to reduce the rent was made or contemplated after this date. Hence, if there was an agreement at all to that effect, it must have been made between 24th November and 16th March; and seeing that no letter of the pursuer is founded on, it must have been effected by Scott-Moncrieff & Trail within that period.

"There are then two questions—(1) Is it proved by the writ of Scott-Moncrieff & Trail that they granted this reduction? and (2) If that be proved, is it proved that they did so with the pursuer's knowledge and authority?

"The first question depends almost entirely on three letters?—first a letter of 22nd December by Scott-Moncrieff & Trail to the defender, in which they complain that he had paid no rent since Whitsunday 1895, and proceed, 'This is not what was expected when it was agreed to allow you to remain on the farm at a reduced rent.' This letter speaks of an agreement to reduce the rent as a concluded matter, and when it is considered that the only reduced rent which had been brought into question, as appears from other letters, was £290, it may, I think, be read as a statement by Scott-Moncrieff & Trail that that reduction had been agreed to. No mention is made here about security, and I rather think that it appears that the idea of securing Mr Turnbull as a cautioner had been given up.

"On 16th January Scott-Moncrieff & Trail wrote the defender pressing for a

---

*This letter was in the following terms—"Mr Bell has made no payments to Messrs Tait, so far as appears from their accounts rendered to us, except the half-year's rent due Marts. 1895, paid in April last, and the cheque for which was stopped and £100 paid on 9th September last, to account of the rent due prior to the late Colonel Dickson's death. We must ask that payment be made to us at once of at least a year's rent at £290 without prejudice. With regard to the lease, it has not yet been signed. We regret that there should have been any misunderstanding as to the proposed modification of the rent. Messrs Tait assured us that Mr Turnbull promised 'to back' Mr Bell, and we are quite clear that at our meeting with Mr Bell here, about a year ago, he stated to us that Mr Turnbull was to be cautioner for him for payment of the rent throughout the lease. If Mr Turnbull declines to be cautioner for the whole period of the lease yet to run, we shall be glad to know if he will be cautioner for the last year's rent that may be payable under the lease." It was followed by another letter dated 15th December 1896, in which Messrs Scott-Moncrieff & Trail wrote —"With reference to our letter of 24th ulto. we shall now be glad to have a remittance on account of the rent due by Mr Bell."

payment, and on 22nd January he remitted a sum of £200 to account. That I think was a payment made on the footing that the rent had been reduced. But no doubt it was due in any event.

"A second important letter from Scott-Moncrieff & Trail is dated 23rd January.† They acknowledge receipt of the £200, and enclose receipt (which has not been produced), and they add, 'We shall be glad to receive a remittance of £90 of the rent to Whitsunday last' (1896). Now, that £90 was a balance of the £290 of rent, and this letter seems a written admission by the landlord's agents that that was the whole rent due from Whitsunday 1895 to Whitsunday 1896. The only other letter which it seems necessary to notice is one dated 6th March 1897, in which Scott-Moncrieff & Trail, writing to the defender, give the note of rents due as being—

'Balance of half-year's rent to Whitsunday 1896, ... £ 90
'Half-year's rent to Martinmas, . . . 145
£235.'

"Now, it appears to me that these letters prove *scripto* of Scott-Moncrieff & Trail, and very explicitly, that they had agreed to a reduction of the rent, and it appears to me that they import a reduction of the rent during what remained of the original lease, and I consider that they import a waiver of the previous demand for security. Had they been in the handwriting of the pursuer I incline to think that he could not have been heard to dispute this conclusion. It is true that what prevented the completion of the transaction sooner was the want of security, and it is also true that there seems to be no written waiver of that condition. But still I think that if the pursuer had written these letters he could not have drawn back on the ground that the condition of finding security had not been expressly waived. No doubt it is not altogether satisfactory to have to decide this question on these letters. It would have been much more satisfactory had there been a formal minute. But it is to be considered that the agency of Scott-Moncreiff & Trail was cut short without warning, which may account for the want of a minute. But on the whole it appears to me that the letters which I have referred to solve the first of the two foregoing questions in favour of the defender.

"The next point is, Were these letters authorised by the pursuer? Now, this is a point for parole evidence. It appears to be clearly proved by Mr D. Scott-Moncrieff and by the witnesses Paterson and Cosens that the pursuer when in Edinburgh manifested, as was to be expected, the greatest possible interest in his new estate; that he was in the office almost every day making inquiries about it. It is very difficult to suppose that the letters to which I have referred were written without his knowledge. Mr D. Scott-Moncrieff speaks most definitely about the letter of 22nd December as having been written with the pursuer's knowledge and by his instructions, and Paterson, who had perhaps most to do with the pursuer's business, extends that evidence to all these letters. Of course Mr Scott-Moncrieff believed that he had the pursuer's authority, and it appears to be sufficiently proved that belief was warranted. On the question of evidence of authority there is a document of a different kind which is of some importance. It is a memorial sent to Professor Rankine for his opinion on the question whether the annuity payable to the widow of the last heir of entail, Colonel Archibald Dickson, was to be calculated on the footing that the rent of Horsleyhill was £400 or £290, and in that memorial there occurs the following statement:—'It may be mentioned, however, that in view of the valuation of the farm by Mr Clay, and that Mr Bell was to be assisted by his brother-in-law, the memorialist's agents agreed to allow him to continue tenant of the farm at the reduced rent of £290 per annum.' It is, I think, proved that the pursuer was aware of the terms of this memorial. I do not suggest that the memorial is competent proof of the alleged alteration of the lease, but it is proof, I think, of the pursuer's knowledge that his agents had reduced the rent, and of his sanction of their act. It is true that the proposed assistance of Mr Turnbull is mentioned, but it is not said that that assistance was to be an essential condition of the reduction. The contrary seems implied by the mere submission to counsel of the question, which could not have arisen at all unless the reduction of the rent had been agreed on; and besides, the subsequent letters, as I have suggested, may and should be held to show that this condition had been waived.

"I have not found the pursuer's evidence on this point at all satisfactory. He is now doubtful and then he is certain. I cannot say how far he understood the explanations which doubtless were offered. The most absurd and baseless suspicions about Scott-Moncrieff & Trail seem to have got into his head. He seems to have suspected them of acting against his interests and in the interests of some-one else, and of concealing their letters and withholding his papers, for all of which notions I do not see the least particle of reason. It is no compliment to Scott-Moncrieff & Trail to assume that they acted perfectly uprightly in the management of the pursuer's business, for in truth they had no conceivable motive for doing anything else, and the pursuer's suggestions as to their motives, as, for example, when he suggests that they wished to favour Mr Clay, seem the merest moonshine; but they seem to have affected the pursuer, and

† This letter was in the following terms—"We have received your note of yesterday's date with cheque for £200, on account of rent due for your farm, for which we enclose receipt with thanks. We shall be glad to receive a remittance of the balance of £90 of the rent to Whitsunday last along with the half-year's rent due at Martinmas, as the rent cannot be allowed to fall in arrear, seeing that it has so recently been so very much reduced."

may have biassed his judgment and memory. On the whole I cannot regard the pursuer's evidence as materially affecting the evidence for the defender. Necessarily he is the only witness for himself on the point, as Mr Haddon did not know what had taken place before he became the pursuer's agent.

"The defender founded on a circumstance which I do not regard as of any consequence, viz., that Mr Haddon returned the rent to the Assessor as £290. The defender's counsel argued this point, and quoted *Emslie* v. *Duff*, June 2, 1865, 3 Macph. 854; and *Rattray* v. *Leslie's Trustees*, June 11, 1892, 19 R. 853. But Mr Haddon explains why he did this, and I think his reason is sufficient, and am very clearly of opinion that this circumstance, although perhaps it might be competently referred to, is of little or no weight. But, as I have said, I think the defender's case sufficient without it.

"Now, if it be adequately proved that the letters which have been referred to were written with the authority of the pursuer, the result in law is that these letters are the pursuer's writ. That was not disputed, and if they can be regarded as the pursuer's writ, then I am of opinion that they prove the defender's case. If they had been actually written by the pursuer, could he have demanded the old rent? I am of opinion, not wholly without hesitation, that he could not.

"The view which I have taken is that the case does not depend on anything done or written before the pursuer succeeded, but solely on letters written for himself by his authority, and that the defender's averment of an alteration of the lease has been proved wholly by what is in law the pursuer's writ, and in no part by parole. Perhaps the notes of evidence may include statements which may not be competent evidence on this point, but they are not thereby made evidence, and the narrative of the case could not, I think, have been otherwise told. Taking this view of the case, I am not aware that any disputable question of law arises, and it is not necessary to consider the authorities referred to, and with which it might have been necessary to deal if I had held that the defender's case depended on any agreement prior to the pursuer's succession.

"A statement has been lodged for the defender purporting to show the sum due by him on the footing that the rent had been £290 since Whitsunday 1895, and it has not been criticised. It takes credit for the two payments of £200 and £390, and brings out a balance due to the pursuer of £17, 19s. 11d. I have been informed that an additional sum has since been paid."

The pursuer reclaimed, and argued—(1) The letters did not alter the contract of lease. A lease was a formal document, and one of its chief conditions was a fixed rent. Such a condition could not be altered by vague informal writings. A lease was a bargain as regards heritage, and any alteration of its terms must be express and by probative document. In the present case it was quite clear that Messrs Scott-Moncrieff & Trail and Mr Bell intended at one time to carry out an alteration in the lease by reducing the rent by means of a formal minute of agreement. But this had never been done. An improbative document might be set up by *rei interventus*. Here no *rei interventus* followed on the letters. Besides, the letters did not instruct any agreement at all. They did not constitute any arrangement between the parties. One could not gather from them that any arrangement had been decided on, or any date from which the agreement was to be operative, or any period during which it was to last. On these grounds the letters must be held not to have altered the lease —Hunter's Landlord and Tenant, ii. 469; *Riddick* v. *Wightman*, May 27, 1790, Hume 776; *Gibb* v. *Winning*, May 28, 1829, 7 S. 677; *Caithness Flagstone Quarrying Company* v. *Sinclair*, July 9, 1880, 7 R. 1117, *aff.* April 7, 1881, 8 R. (H.L.) 78; *Carron Company* v. *Henderson's Trustees*, July 15, 1896, 23 R. 1042, opinion of Lord M'Laren, 1054. (2) Even if the letters were held sufficient to alter the lease, they did not do so in a question with the pursuer. In order to write such a letter, Messrs Scott-Moncrieff & Trail would have required the written authority of the pursuer, and they had no written authority or authority of any kind. The pursuer had never homologated such a contract. He had never known what the contract was, if one existed, and a man could not be held to have homologated a contract unless it could be shown that he understood its terms — *Shaw* v. *Shaw*, March 6, 1851, 13 D. 877; *Wemyss' Trustees* v. *Lord Advocate*, December 11, 1896, 24 R. 216.

Argued for defender—The judgment of the Lord Ordinary was sound. (1) It was not necessary that a reduction of the rent in a lease should be made by a formal and holograph writing. Rent in a lease could be reduced by a writing which was not holograph—*Law* v. *Gibsone*, February 3, 1835, 13 S. 396—or by an informal document like a letter—*Lindsay* v. *Webster*, December 9, 1841, 4 D. 231. (2) The authority of Messrs Scott-Moncrieff & Trail to reduce the rent did not require to be proved by writing. It did not need to be given to them by the pursuer in writing; the reduction could be made by the agents on the verbal instructions of the landlord—*Steuart* v. *Johnstone*, July 17, 1857, 19 D. 1071; *Mackenzie* v. *Brodie*, June 24, 1859, 21 D. 1048; *Emslie* v. *Duff*, June 2, 1865, 3 Macph. 854; *Horne* v. *Morrison*, July 3, 1877, 4 R. 977; *Pant Mawr Quarry Co.* v. *Fleming*, January 16, 1883, 10 R. 457. The authority in the present case had been amply proved, and the reduction of the rent had been effectually carried out.

At advising—

Lord Justice-Clerk—The defender in this case, to be successful in resisting the pursuer's claim must establish his defence by evidence competent to prove an agreement to depart from the written bargain contained in his lease as to the rent payable

by him. That is to say, he must establish by what is the writ of the pursuer that it was agreed to alter the lease to the extent of abating a proportion of the rent.

The first question is, whether the letters which were written by Messrs Scott-Moncrieff & Trail while the pursuer was their client were written by them with his knowledge and authority, and if the case depended upon this alone I would entertain no doubt. I think the Lord Ordinary is right in holding that they were so written, and if they imported an unconditional agreement that less rent was to be taken during the remainder of the currency of the lease, then I think that the defender would be entitled to succeed in resisting the demand for the original rent.

Now, this being a case in which it is contended by the defender that the stipulations in a formal deed are to give way to subsequent writ of an informal kind, the documents founded on in support of the contentions of the defender must be narrowly scrutinised, and effect given to them only if they clearly and unambiguously show that a change was actually made in the agreed-on terms of lease. Looking at the letters founded on in their sequence, I find that in the original proposals for a reduction of rent it formed part of the proposed agreement that the defenders should find a cautioner for the future rents. Does it appear that this condition was ever departed from by the pursuer's authority? Giving the case the best consideration I can, I am unable to come to the conclusion that it was departed from. After the pursuer's return to this country, and when Messrs Scott-Moncrieff & Trail were pressing for payment of rent, they speak of a payment "of at least a year's rent of £290, without prejudice," and they express regret "that there should have been any misunderstanding as to the proposed modification of rent." I do not think it can be said that at this time—the end of 1896—an agreement had been come to, otherwise the language of this letter would have been inappropriate. I do not find that the subsequent correspondence makes it clear that at any date what was not complete in November 1896 had been completed. The agents refer back to that letter in pressing for a payment, and although they speak of the defender's failure to remit as not being what was expected when it was agreed to allow the defender to remain at a reduced rent, these words must be taken to refer back to what had previously been said on that matter, viz., that a reduced rent would be accepted if caution was found for the future. I cannot find trace of any agreement entered into after the end of 1896, and any agreement referred to as entered into before that date was, in my opinion, conditional, the condition contemplated never being fulfilled.

I therefore, although with regret, seeing that the evidence establishes that the defender's farm is considerably over-rented, am constrained to hold that the defence has not been established, and that the interlocutor of the Lord Ordinary must be altered.

Lord Young—I shall express my opinion in this case without entering into any detail. The lease is dated in 1891, and is a written lease for fifteen years. Unless, therefore, it is set aside, it is now running, and will run on to 1906. By this lease the defender is the tenant of a specified farm at a specified rent for a specified time. The leading conclusion of the summons, and that upon which the whole question depends, is that the defender is still bound to pay a rent of £400, and therefore no alteration has been made on the lease in regard to the rent by which the rent has been reduced from £400 to £290. The question to be decided is therefore whether it has been legally and satisfactorily proved that such an alteration in this important condition of the lease has been made with the consent of the pursuer. The Lord Ordinary has given judgment that this has been proved, and he rests his judgment on three letters, dated 22nd December 1896, 23rd January and 6th March 1897. On these letters I am of opinion that it has not been established that such a reduction of rent was ever made. Perhaps I ought to have prefaced this with the remark that I think there is a manifest and important distinction between reducing rent for a particular term and altering the amount of rent payable under a lease which has currency for a number of years. It is a matter of common trust administration if a tenant has fallen into arrears to take payment of these arrears at a reduced rate and let him off so much. That may very well be done by a man of business without special authority. But to reduce rent for the remaining period of the currency of the lease is another matter. The question here, is whether these letters constitute an agreement on the part of the landlord to change the terms of the lease with respect to rent during its currency? I am of opinion that they do not. Having that opinion, I do not need to express an opinion as to whether a man of business can without written authority change the terms of a lease during its future currency. Certainly the ordinary and only proper mode of altering any conditions of a lease so important as the amount of the rent, and the mode adopted as matter of practice by all men of business, is to get written authority from the landlord to do so.

If my opinion is correct, that these letters indicate no intention to reduce the rent unconditionally, that disposes of the case. But suppose it is assumed that the man of business proceeded on the assumption that he had authority to alter the rent, and that these letters did alter the rent, the second question comes to be "Had he authority?" I am of opinion that he had none. The proprietor came to this country in November 1896. The Lord Ordinary expresses an opinion that there was no agreement for reduction of the rent prior to 24th November 1896, and that none was made or contemplated after 16th March 1897. The question therefore comes to be this—if between these dates the proprietor gave authority to his man of busi-

ness to alter the rent. I am of opinion that there is nothing to show that he did.

On these grounds I think that the judgment of the Lord Ordinary ought to be altered, and that the pursuer should have judgment in terms of the conclusions of the summons.

LORD TRAYNER—The case appears to me to be one of difficulty, but I have come to the conclusion that the Lord Ordinary is right.

The lease on which the pursuer founds is in all respects formal and binding, and it stipulates for a rent of £400 a-year. This must be held as regulating the right of the pursuer, as well as the obligation of the defender, unless the latter can show *habili modo* that the rent was reduced by agreement and the lease to that extent altered.

The defender can only prove the agreement to alter the lease by the writ or oath of the pursuer. Writ under the hand of the pursuer the defender has not got. But he has the writ of the pursuer's law-agent which he says is in law equivalent to the writ of the pursuer.

I have no doubt that the writ of a law-agent or factor is equivalent to the writ of the client or landlord, where the writ deals with a matter within the scope of the agent or factor's authority, or where it has been shewn that the writ has been specially authorised or homologated by the principal. The writ relied on by the defender consists of the letters mentioned in detail by the Lord Ordinary. These letters show that the rent had been reduced to £290 a-year. That these letters were written in the knowledge and on the instructions of the pursuer, appears from the evidence of Mr Scott-Moncrieff, Mr Paterson, and Mr Cosens (whose perfect accuracy there is no reason whatever for doubting), corroborated by the fact that a memorial to counsel which set forth the fact of the reduction was read to the pursuer and no objection taken to the statement by him.

Such knowledge without objection would probably infer authority, but when the authority is otherwise proved this knowledge is strong corroboration of such proof.

The only evidence against this is the pursuer's own. But a perusal of his evidence is enough to show that it is not reliable. The Lord Ordinary thinks little of it. "I have not found the pursuer's evidence on this point at all satisfactory. He is now doubtful and then he is certain." This criticism might justly have been more severe.

It is said, however, that it was a condition of the reduction of rent that the defenders should find caution. That in my opinion does not appear. The letters explain how the misunderstanding arose. The defender was in arrear with his rent, and was asking (1) an abatement of the arrears, and (2) a reduction of rent. He represented that Mr Turnbull was willing to assist him if his request was granted. Messrs Scott-Moncrieff & Trail certainly understood that Mr Turnbull was to become cautioner from what the defender said; but all the letters point at Mr Turnbull "assisting" or "backing up" the defender, and this he did by paying £200 of the arrears. It does not appear ever to have been made a distinct condition on which arrears were to be abated or rent reduced that caution should be found, but if it was, that condition was not insisted in. It rather comes to this, that caution, if found, might facilitate the proposed arrangement being carried out. But as caution could not be got, that matter as part of the arrangement appears to have been dropped. There is a modified proposal for caution in the letter of 24th November 1896, but that also fell through, and caution is not referred to as a condition of the reduction of rent in the letter of 22nd December 1896 where the reduced rent is said to have been "agreed to."

The pursuer's contention, I am constrained to think, is not a fair or honest one. He certainly knew that his agents had reduced the rent, and made no objection. I think he must be held to have acquiesced; and in my opinion the agent's writ proves that the reduction was agreed to with the consent of the pursuer.

LORD MONCREIFF—I regret to differ from the Lord Ordinary, because it appears from the proof that £290 is an adequate rent for the farm. But it lay upon the defender to prove by competent evidence that the pursuer agreed to reduce the rent from £400 to £290, and this I think he has failed to do.

The gist of the Lord Ordinary's opinion is in the following sentence in his note. "The view which I have taken is that the case does not depend on anything done or written before the pursuer succeeded, but solely on letters written by himself or on his authority, and that the defender's averment of an alteration of the lease had been proved wholly by what is in law the pursuer's writ, and in no part by parole."

Now, I am of opinion with the Lord Ordinary that if Messrs Scott-Moncrieff & Trail's letters (which are relied on by the defender) when properly construed in the light of the circumstances, import an unconditional agreement to reduce the rent from £400 to £290 for the remaining ten or eleven years of the lease, it is sufficiently proved that the pursuer was aware of and authorised the writing of those letters, and accordingly he is bound by them. The one point—but it is vital—upon which I differ is that I am not satisfied that the letters will bear that meaning. Undoubtedly both before and after the pursuer's return to this country there was a conditional agreement to reduce the rent—that is, conditional on the landlord being given satisfactory security for the whole or part of the rent due or to become due. What in my opinion has not been instructed is that this conditional agreement ever became unconditional. It undoubtedly was merely provisional before the pursuer's return, because we see that the parties ineffectually attempted to adjust a draft

minute of alteration, in which the landlord proposed and the tenant rejected a stipulation for caution. But coming to a much later date, after the pursuer's return we find the question as to caution still unsettled. So late as 24th November 1896 Scott-Moncrieff & Trail write to Purdom & Sons, acting for the defender,—"We must ask that payment be made to us at once of at least a year's rent of £290 without prejudice. With regard to the lease, it has not yet been signed. We regret that there should have been any misunderstanding as to the proposed modification of rent." Thus matters were then entirely open, and although the defender was asked to make a payment to account at the reduced rate, this was expressly put on the footing that it was to be "without prejudice."

Now, my view is that all which followed in the correspondence in regard to payment of arrears of rent at the reduced rate of £290 was, as this letter calls it, "without prejudice," although these words are not again used. Thus Scott-Moncrieff & Trail again write on the 15th December 1896—"*With reference to our letter of 24th ultimo*, we shall now be glad to have a remittance on account of the rent due by Mr Bell." Again, on 22nd December 1896 (only a week later, and no communication being made to or by the defender in the meantime) they write to the defender asking a remittance on account of his rent, pointing out that three half-years' rent were in arrears. They then continue—"This is not what was expected *when it was agreed to allow you to remain on the farm at a reduced rent;* and we hope you will be able to pay off these arrears soon after the New Year." No doubt the words which I have italicised (which are strongly founded on by the defender), if taken by themselves might be read as implying that there was an antecedent unconditional agreement that the rent should be reduced. But it is plain that the agreement referred to in the letter of 22nd December was merely the conditional agreement referred to in the letter of 24th November, which must be read along with it; and this is in accordance with the facts, because if it is competent to look at the parole evidence, it appears that no agreement, verbal or other, was come to between the pursuer or Scott-Moncrieff & Trail on the one hand, and the defender or his agents on the other, in the interval between 24th November and 22nd Decmber 1896. The words are "it was agreed," not "we hereby agree." Now, there is no trace of any antecedent unconditional agreement.

It may be that the pursuer was anxious that some of the arrears should be paid up, whether at the original or at the proposed reduced rate; and if the defender had at once paid up the arrears at the reduced rate the pursuer might perhaps have been precluded from thereafter claiming rent at a higher rate for the periods to which such payment applies. But with the exception of £200 the arrears were not paid up during the period covered by this correspondence.

Therefore, on the whole matter, there being admittedly no *rei interventus* in the case, and the defender being still bound under a lease in which the stipulated rent is £400 a-year, I think the pursuer is entitled to decree in terms of the first alternative conclusion of the summons, and decree for the balance of rent at the rate of £400 per annum.

The Court pronounced the following interlocutor:—

"Recal the said interlocutor: Find and declare in terms of the first three declaratory conclusions of the action, and ordain the defender to make payment to the pursuer of the sum of £641, 10s. 11d. sterling, under deduction of the sum of £390 sterling paid on 4th February 1898, and of the sum of £110 sterling paid on 20th May 1898, with interest at the rate of £5 per centum per annum from the date of citation on the sums remaining due until payment, and decern."

Counsel for Pursuer—Young—W. Thomson. Agents—Steele & Johnstone, W.S.

Counsel for Defender—Guthrie, Q.C.—Sym. Agents—Scott-Moncrieff & Trail, W.S.

Friday, January 27.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CAMERON *v.* YEATS.

Proof—Onus—Credibility.

In an action of damages for slander, the slander complained of was contained in a letter signed in the defender's name, and initialed by the writer, who was a female cashier or clerk in the defender's employment. The letter was afterwards entered in the defender's letter-book. It was proved that the defender was, at the date when the letter was written, suffering from inflamation of the lungs and was confined to bed, but it was admitted that he might have seen the writer of the letter at the time as she lived in his house. The defender denied having instructed the letter to be written, and the writer also deponed that she had written it without the knowledge or consent of the defender. She was proved to have taken part in the dispute to which the letter referred and to dislike the pursuer on other grounds. The only other witness called by the pursuer was his brother who deponed that the defender's cashier had admitted in conversation with him that she had been instructed to write the letter.

Held (recalling the judgment of the Sheriff-Substitute—*diss.* Lord Moncreiff) that the onus of proving that the letter was authorised by the defender, lay upon the pursuer, and that accordingly his case failed even on the view